**Office of Chief Counsel**
**Internal Revenue Service**

# memorandum

CC:LM:NR:DEN:TL-N-1103-01
WRDavis

date: 7/6/01

to: Team Manager, LMSB, Group 1292

from: Area Counsel
(Natural Resources:Houston)

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subject: **Request for LMSB Division Counsel Assistance:** [redacted]

**A. Consent Language:** [redacted]
**B. Consent Language:** [redacted] **partnerships**
**C. Identification of Persons Who Must Sign Assessment Waivers for TEFRA Partnership Settlement:** [redacted] **partnerships**

This memorandum transmits several revisions to the prior advice provided on the above-referenced matters. In addition to a summary of the revised recommendations, we are transmitting herewith a copy of the Informal Field Assistance memorandum for reference. For simplicity, the revisions are identified by the paragraph numbers used in the May 29 memorandum. This memorandum should not be cited as precedent.

**DISCLOSURE STATEMENT**

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

1. We recommend identifying the taxpayer on the consent to extend the assessment statute form as follows:

> [redacted] (EIN: [redacted]), formerly [redacted], as successor to [redacted] (EIN: [redacted]), formerly [redacted], and as alternative agent under Treas. Reg. § 1.1502-77T for the members of the [redacted] consolidated group*.

At the bottom of the form, type:

> * This is with respect to the [redacted] consolidated group for the [redacted], [redacted], [redacted], [redacted], and [redacted] taxable years.

Finally, as has been previously discussed with [redacted], the team leader for the [redacted] audit, instead of adding language to the Form 872 to make the consents applicable to any TEFRA partnership items that may be included in the consolidated group return, we recommend using new Forms 872-i or 872-iA, which serve the same purpose.

4. & 5. In lieu of our recommendation in the May 29 memorandum that [redacted] be treated as alternative agent under Temp. Treas. Reg. § 1.1502-77T for this purpose, we recommend that, for purposes of entering into settlements with the partners of TEFRA partnerships where the common parent of the partners ceases to exist, with respect to each year at issue, you have the remaining members of the affiliated group designate another member to act as agent for the group (subject to the Commissioner's approval). See Treas. Reg. § 1.1502-77(d). You should then have the "new" agent for the group execute Form 870-P. Alternatively, if such a designation is not obtained, you may seek to have as many of the remaining group members as possible execute the Form 870-P.

In addition, we recommend that each corporate partner still in existence (i.e., [redacted] and [redacted]) execute the Form 870-P on its own behalf. With respect to [redacted], which subsequently merged into [redacted], we suggest having [redacted] execute the Form 870-P as a successor in interest. Also, we recommend that you make no reference to any partner's purported status as Tax Matters Partner on the Forms 870-P.

As a final matter, we request that you hold in abeyance seeking Forms 977 from [redacted], until we receive further clarification regarding the proper identification of the transferor taxpayer.

Please do not hesitate to contact Bill Davis if you need further assistance concerning this matter, at (303) 844-2214, ext. 259.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By: S/
DAVID J. MUNGO
Associate Area Counsel (LMSB)

Attachment

**Office of Chief Counsel**
**Internal Revenue Service**

# memorandum

CC:LM:NR:DEN:TL-N-1103-01
WRDavis

date: 5/29/01

to: Team Manager, LMSB, Group 1292

from: Area Counsel
(Natural Resources:Houston)

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subject: **Request for LMSB Division Counsel Assistance:**
[redacted]
**A. Consent Language:** [redacted]
**B. Consent Language:** [redacted] **partnerships**
**C. Identification of Persons Who Must Sign Assessment Waivers for TEFRA Partnership Settlement:** [redacted] **partnerships**

This memorandum responds to your requests for assistance seeking our opinion as to the proper parties and language to include on consents to extend the statute of limitations on assessment for [redacted] for the taxable years [redacted], [redacted], [redacted], [redacted], and [redacted]. It further provides guidance as to the effect of a common parent's statute extension where members of the [redacted] consolidated group were partners of certain partnerships that fell under the small partnership exception to the TEFRA unified audit and litigation procedures in [redacted]. Additionally, it responds to your request seeking assistance in identifying those persons who must sign Form 870-P for the [redacted] - [redacted] tax years for corporate partners of TEFRA partnerships where the partners were members of the [redacted] consolidated group in those years. This memorandum should not be cited as precedent.

**DISCLOSURE STATEMENT**

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

**ISSUES**

1. Consolidated Group Consents: What is the correct wording of a consent to extend the statute of limitations upon assessment of income tax for [redacted] and subsidiaries (taxpayer) for its taxable years [redacted], [redacted], [redacted], [redacted], and [redacted]?

2. [redacted] Partnership Statutes: For each of the following partnerships, does the extension of the [redacted] statute of limitations for the [redacted], and subsidiaries consolidated group extend the statute of limitations on assessment of any additional tax attributable to the listed partners' distributive share of any adjustment to items on the partnership returns for that year where the partners were members of the [redacted], affiliated group in [redacted]? If not, how can the statute of limitations on such additional tax be extended?

| | Partnership/TIN | Partner/TIN |
|---|---|---|
| a. | [redacted] | [redacted] |
| b. | [redacted] | [redacted] |
| c. | [redacted] | [redacted] |
| d. | [redacted] | [redacted] |
| e. | [redacted] | [redacted] |
| f. | [redacted] | [redacted] |

3. [redacted] Partnership Statutes: For each of the following partnerships, does the extension of the [redacted] statute of limitations for the common parent of the consolidated group under which the partner's income, gains, losses, deductions, and credits were reported in [redacted] extend the statute of limitations

on assessment of any additional tax attributable to the partners' distributive share of any adjustment to items on the partnership returns for that year? If not, how can the statute of limitations on such additional tax be extended?

| | Partnership/TIN | Partner/TIN |
|---|---|---|
| a. | [redacted] | [redacted] |
| b. | [redacted] | [redacted] |

4. TEFRA Partnership Adjustment Consents: What are the correct names to be shown as the corporate taxpayers agreeing to assessment of deficiencies in [redacted], [redacted], and [redacted] income tax for partnership adjustments to TEFRA partnerships for which the partners were members of the [redacted] consolidated group, and [redacted], was the Tax Matters Partner?

5. TEFRA Partnership Adjustment Consents: For the agreements referenced in paragraph 4., above, which corporate persons must sign the Forms 870-P, agreements to assessment for partnership items, to effect the settlements regarding the tax treatment of partnership items between the Service and [redacted], [redacted], and [redacted], the corporate partners that were members of the [redacted], and subsidiaries consolidated group for the taxable year, [redacted], through [redacted], where both the tax matters partner and the common parent have been merged into other corporations in the interim, pursuant to I.R.C. §§ 368(a)(1)(A)?

**CONCLUSIONS**

1. We recommend that you submit the consents to one of the authorized officers of "[redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N. [redacted]), as successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N.: [redacted]), as alternative agent under Treas. Reg. § 1.1502-77T for the [redacted] consolidated group." Additionally, if at least one of the members of the group was in a TEFRA partnership for that year, the following language should be inserted into a corporate Form 872:

> With regard to interests held in entities that are subject to the TEFRA unified audit and litigation procedures, and without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including penalties, additions to tax and interest) attributable to any partnership items, affected items, computational adjustments, and partnership items converted to nonpartnership items. This agreement also extends the period for filing a request for administrative adjustment. For partnership items that have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

If a Form 872-A is used, the following language must be added to the above language:

> The issuance of a notice of deficiency will not terminate this agreement under paragraphs (1) and/or (2) for the items described by this paragraph.

To extend the Service's statute of limitations for asserting transferee liability against [redacted], the successor-in-interest to [redacted], which was spun-off from the affiliated group in [redacted], we recommend that you obtain its consent to an extension of the statute of limitations. To do so, you should use Form 977, "Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary." In the space for the transferee, identify as "[redacted] (E.I.N. [redacted]), as successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted], successor-in-interest to [redacted] (E.I.N. [redacted])." Identify the transferor as "the [redacted] consolidated group (E.I.N. [redacted])," and the tax periods as [redacted], [redacted], [redacted], [redacted], and [redacted].

We further remind you that you must notify the taxpayer of its right 1) to refuse to extend the period of limitations, or 2) to limit the extension to a particular issue, or 3) to limit the extension to a particular period of time. Further, it is suggested that you secure consents to extend statutes of limitation by sending Letter 907(DO).

2. and 3. This response is based upon the assertion that the TEFRA unified audit and litigation procedures do not apply to the partnerships identified in this question. Since the partners with respect to which your request applies are members, other than the common parent, of affiliated groups that elected to file consolidated returns, absent any other complicating circumstances, that common parent alone can extend the statute of limitations for any adjustments arising from its subsidiary's distributive share of partnership items, pursuant to section 6501(c)(4).

4. For each partner in the six identified partnerships for which [redacted] ("[redacted]"), was the tax matters partner under section 6231(a)(7), you should identify the taxpayer as the corporate partner. In the case of [redacted], and [redacted], you should identify these corporations as the taxpayers. In the case of [redacted], you should identify the taxpayer as "[redacted], as successor-in-interest to [redacted]." For each, you should identify the tax matters partner as "[redacted], as successor by merger to [redacted]."

5. For each corporate partner executing a Form 870-P, you must obtain the signatures of both an authorized representative of the corporate partner, and of an authorized representative of the common parent of the affiliated group under which the corporate partner was included for that taxable year. For the corporate partner signature line, identify the partner in the following manner:

> [redacted], as successor-in-interest to [redacted], partner of <*insert name of partnership to which this consent applies*>, by <*insert name and title of authorized representative/officer signing for* [redacted]>.

Use a similar format for the partner signature line for each of the Forms 870-P to be executed by [redacted] and [redacted].

You must obtain the signature of an authorized representative of [redacted] (i.e., the subsidiary of [redacted]) on each Form 870-P, as well. Identify the common parent signature line with the following language:

> [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N. [redacted]), as successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N.: [redacted]), by

*<insert name and title of authorized representative/officer signing for* [redacted]*>*, as agent for and common parent of *<insert name of corporate partner>*, partner of *<insert name of partnership to which this consent applies>*.

**FACTS**

1. Consolidated Group Consents: Consolidated corporate income tax returns were filed for [redacted], a Colorado corporation ([redacted]) and subsidiaries, E.I.N. [redacted], for its taxable years ended [redacted] and [redacted], in accordance with I.R.C. § 1501 et seq. and the regulations thereunder. For the taxable years ended [redacted], [redacted], and [redacted], a Delaware corporation (Old [redacted]) and subsidiaries, E.I.N. [redacted], filed consolidated corporate income tax returns. For the taxable years [redacted] and [redacted], [redacted] filed consolidated returns for itself and as the common parent agent for its affiliated companies. For the taxable years [redacted], [redacted], and [redacted], Old [redacted] filed consolidated returns for itself and as the common parent agent for its affiliated companies.

Old [redacted] had been incorporated by [redacted], a Colorado corporation ([redacted]), under the laws of the state of Delaware on [redacted]. Thereafter, effective [redacted], [redacted] merged into Old [redacted] in a merger qualifying as a reorganization under section 368(a)(1)(F).

As part of the [redacted], transactions, Old [redacted] divided the majority of its businesses, all conducted by members of the consolidated group, into two groups: the [redacted] group and the [redacted] group. Additionally, in the merger of [redacted] into Old [redacted], each outstanding share of [redacted] common stock was converted into one share of [redacted] common stock of Old [redacted], and one share of [redacted] stock of Old [redacted]. [redacted] continued to own all outstanding shares of [redacted], a Colorado corporation ([redacted]), under which all activities of the [redacted] group were conducted, either by itself or its subsidiaries. Likewise, Old [redacted] continued to own all outstanding shares of [redacted], under which all activities of the [redacted] group were conducted, either by itself or its subsidiaries.

**Spin-off of [redacted]**

On [redacted], Old [redacted] separated its [redacted] business from its [redacted] business by

spinning off the former. This was accomplished through a number of intervening steps, the relevant ones of which are explained herein. First, [redacted] incorporated a new subsidiary corporation under the laws of Delaware ([redacted]). Thereafter, [redacted] merged with and into [redacted], and issued to Old [redacted] that number of shares of common stock equal to the number of [redacted] common stock of Old [redacted] then outstanding. This portion of the transaction has been pronounced as qualifying as a tax-free reorganization described in section 368(a)(1)(F).

Old [redacted] further effected the separation by contributing all of the issued and outstanding capital stock of the [redacted] group subsidiaries, and certain other assets, including rights to the name, "[redacted]," to [redacted]. Immediately thereafter, Old [redacted] distributed all of the issued and outstanding capital stock of [redacted], by exchanging each share for one share of [redacted] common stock of Old [redacted] held by its stockholders. Prior to the spin-off of [redacted], Old [redacted] sought, and received, a private letter ruling determining that this, and other related transactions needed to accomplish this spin-off, constituted a tax-free reorganization. The details of the particular transactions, and the bases for the tax treatment, are included in Priv. Ltr. Rul. 121669-97 (Mar. 27, 1998).

As a result thereafter, only holders of the [redacted] common stock of Old [redacted] owned shares of Old [redacted] common stock, inasmuch as the [redacted] common stock of Old [redacted] was canceled after the exchange for [redacted], stock. Finally, [redacted], was renamed [redacted], a Delaware corporation, E.I.N. [redacted] (New [redacted]), and Old [redacted] was renamed [redacted], a Delaware corporation, E.I.N. [redacted] (Old [redacted]).

**[redacted] Merger into [redacted]**

Sometime prior to [redacted], [redacted], a Delaware corporation ("[redacted] merger subsidiary"), was incorporated as a wholly-owned subsidiary of [redacted]. On [redacted], Old [redacted] was merged into the [redacted] merger subsidiary by way of a forward subsidiary merger under section 368(a)(1)(A) and 368(a)(2)(D), where [redacted] stock and cash was used to acquire all Old [redacted] stock immediately preceding the statutory merger. Thereafter, the [redacted] merger subsidiary was renamed [redacted] (New [redacted]), and applied for and received as its E.I.N. [redacted].

**Merger of Spun-off Communications Group into [redacted]**

On [redacted][1], New [redacted] merged with and into [redacted], a Delaware corporation ([redacted]), whereupon the separate existence of New [redacted] ceased, leaving [redacted] as the surviving corporation. [redacted]'s filing with the Securities and Exchange Commission states that the transaction was accounted for as a reverse acquisition under the purchase method of accounting with New [redacted] being deemed the accounting acquirer. [redacted], SEC Form 10-Q ([redacted].

The information provided does not indicate that any member of the [redacted] or the Old [redacted] affiliated groups for the taxable years [redacted] through [redacted] incurred a dual consolidated loss, as contemplated by section 1503(d). For this reason, our analysis does not consider the effect in identifying the persons to execute consents. We further assume that neither Old [redacted] nor New [redacted] designated another member of the consolidated group for which it was the common parent prior to dissolution, which Treas. Reg. § 1.1502-77(d) contemplates.

2., 3., 4., and 5. 1997 Partnership Statutes and TEFRA Partnership Adjustment Consents: The [redacted] partnerships at issue consisted of no more than [redacted] partners, each of which was a C corporation. It is our assumption that the questions concerning the identifying information to be included on the Forms 870-P for [redacted] through [redacted] relate to the same partners and partnerships identified in the attachment to your question concerning statute extension for adjustments attributable to the distributive share from the partnerships in [redacted]. We also base our views on our understanding that no election under section 6231(a)(1)(B)(ii), to subject the partnership to the audit provisions of subchapter C, sections 6221 et seq. (TEFRA audit provisions), was included with the timely-filed [redacted] partnership returns, or has since been made. We further understand that, for the years, [redacted] through [redacted], [redacted] ([redacted]) was the tax matters partner for each of the [redacted] partnerships.

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[1] We note that your memorandum identifies the date of merger of New [redacted] into [redacted] as [redacted], while both the [redacted] Annual Report and a press release located on its web site reflect this date as [redacted]. We also consulted with Mike Brevig, one of the agents assigned to the [redacted] audit team, who cited the [redacted] date. While the difference is not material to this inquiry, we recommend that you confirm the merger date with the taxpayer.

During the years, [redacted] through [redacted], [redacted] was a wholly-owned subsidiary of Old [redacted] and was included in the consolidated tax return filed by Old [redacted] for those years. In [redacted], [redacted] was a wholly-owned subsidiary of [redacted], included in the consolidated tax return filed by [redacted] for that year. Similarly, [redacted], and [redacted], were wholly-owned subsidiaries of [redacted] during the years [redacted] through [redacted], and also were included in the consolidated returns of the common parents for those years.

On [redacted], [redacted] was merged into [redacted] ([redacted]), in a statutory merger with [redacted] surviving. Thereafter, [redacted] was the common parent of an affiliated group including both [redacted], and [redacted].

Subsequently, on [redacted], [redacted] was acquired by [redacted] of the United Kingdom. The acquisition was effected through a merger with a US subsidiary of [redacted], [redacted]. [redacted] was the surviving entity in this merger. We assume that [redacted] is still in existence.

After this merger, [redacted] became [redacted] ([redacted]). [redacted] then contributed its [redacted] stock to a US partnership called [redacted] ([redacted]). [redacted] is a Delaware general partnership consisting of two partnerships, [redacted] and [redacted]. It elected to be treated as a corporation under the entity selection (check-the-box) regulations.

In [redacted], [redacted] "combined" its U.S.-based [redacted] assets with [redacted]'s [redacted] assets to form [redacted]. Financial articles indicate that [redacted], which was renamed [redacted] on [redacted], holds a [redacted] percent interest in the [redacted], the joint venture with [redacted], the successor-in-interest to [redacted]. We believe that [redacted] is a Delaware Limited Liability Company.

[redacted], was a wholly-owned subsidiary of [redacted] and included in the [redacted] consolidated tax return filed by [redacted] for that year. [redacted] is succeeded by [redacted], the successor-in-interest to the merger of [redacted] and [redacted].

[redacted], was included in the [redacted] consolidated tax return filed by [redacted], for that year.

[redacted], was included in the [redacted] consolidated tax return filed by [redacted] ([redacted]) for that year. To our knowledge, [redacted] has not changed its corporate form since [redacted].

**ANALYSIS**

1. Consolidated Group Consents: Generally, section 6501(a) limits assessment of income tax to the period ending three years after the return for that tax period is filed. Among the exceptions to this three-year rule, the consent of both the Service and the taxpayer, in writing, to an extension of this period for assessment will extend this period when such an agreement is executed before the expiration of the assessment period. Section 6501(c)(4).

Generally, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349.

Where a corporate taxpayer stands as the common parent of an affiliated group of corporations, as defined by section 1504(a), it and the members of the affiliated group may, under certain circumstances, elect to file a consolidated return under section 1501 et seq.

Treas. Reg. § 1.1502-77(a) describes the scope of a common parent corporation's agency. There, with the exception of the consent of the members of the affiliated group to consent to filing a consolidated return as part of an affiliated group, and three other circumstances not relevant here, the regulation makes the common parent

> the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. . . . The provisions of this paragraph shall apply whether or not a consolidated return is made for any subsequent year, **and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.**

Treas. Reg. § 1.1502-77(a) (emphasis added).

Additionally, the regulation specifies the effect of a waiver given by the common parent, stating that

> Unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made or levy or proceeding in court begun in respect of the tax for a consolidated return year shall be applicable--
>
> (1) To each corporation which was a member of the group during any part of such taxable year,
>
> and
>
> (2) To each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of §1.1502-75.

Treas. Reg. § 1.1502-77(c).

The corporation formerly known as [redacted] (Old [redacted]), which was the common parent of the affiliated group filing a consolidated return for [redacted], changed its name to [redacted], [redacted], subsequent to the spin-off of [redacted]'s business conducted by the [redacted] group. This being the case, Treas. Reg. § 1.1502-77 makes clear that the common parent for that year remains the agent for members of the group for that year so long as it does not go out of existence. Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985).

Under Temp. Treas. Reg. § 1.1502-77T, alternative agents of the affiliated group may act for it where the common parent of the group ceases to be the common parent, regardless of whether the group remains in existence under Treas. Reg. § 1.1502-75(d). Here, it may be argued that the [redacted] name change of [redacted] to [redacted], and the [redacted] change in place of organization of the common parent for the [redacted] and [redacted] tax years from Colorado to Delaware constitute a cessation of the former common parent's existence for the consolidated returns filed for [redacted], [redacted], and [redacted]. Under Treas. Reg. § 1.1502-75, we believe that Old [redacted] remained the agent of the affiliated group for each of the tax years at issue until it was merged into the [redacted] and ceased to exist. Treas. Reg. § 1.1502-75(d)(2)(i).

The regulation referenced therein specifically holds that "the common parent corporation shall remain as the common parent irrespective of a mere change in identity, form, or place of organization of such common parent corporation (see section 368(a)(1)(F))." Treas. Reg. § 1.1502-75(d)(2)(i). Under these facts, the mere change in identity effected by the merger of [redacted] into Old [redacted], and by the name change of Old [redacted] to Old [redacted] did not change this corporation's position as the common parent of [redacted] and subsidiaries that filed consolidated returns for [redacted], [redacted], [redacted], [redacted], and [redacted].

With the cessation of Old [redacted]'s existence, the temporary regulations identifying alternative agents for statute waivers, among other things, are implicated. Temp. Treas. Reg. § 1.1502-77T(a)(3) deems a waiver of the statute of limitations with respect to the affiliated group that is given by any of the alternative agents identified in Temp. Treas. Reg. § 1.1502-77T(a)(4) to be a waiver given by the agent of the group. That regulation provides four alternative agents, only one of which appears to apply in this instance. Under Treas. Reg. § 1.1502-77T(a)(4)(ii), a successor to the former common parent in a transaction to which section 381(a) applies can give consent to a statute waiver for the affiliated group. Here, [redacted], as successor-in-interest to Old [redacted] in a forward triangular merger under sections 368(a)(1)(A) and 368(a)(2)(D), meets the definition of such a successor, inasmuch as section 381(a)(2) applies to a nonrecognition transaction in connection with a 368(a)(1)(A) reorganization such as this. Likewise, since the renaming of [redacted] to New [redacted] concerns a 368(a)(1)(F) reorganization, also covered by section 381(a)(2), the consent by New [redacted], as an alternative agent under Temp. Treas. Reg. § 1.1502-77T-(a)(4)(ii), is deemed to be consent given by the agent of the affiliated group.

We recommend that you submit the consents to one of the authorized officers of "[redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N. [redacted]), successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N. [redacted]), as alternative agent under Treas. Reg. § 1.1502-77T for the [redacted] consolidated group." We further suggest that you identify the taxpayers whose limitations on assessment are to be extended by the consent by attaching a rider to the Forms 872 identifying each of the corporations that were included in the group for the year(s) for which the statute is extended.

**Transferee Liability Considerations**

As a result of the spin-off, the successor to New [redacted] may be liable as a transferee at law for income tax of Old [redacted]'s consolidated group for years prior to the spin-off, to the extent of the assets transferred to it.

We note that we have been unable to find any authority concerning the effect, if any, of [redacted]'s accounting for the merger of New [redacted] into [redacted] as a reverse merger. We believe that the legal form of the transaction, rather than the surviving corporation's accounting for it, controls the tax ramifications of the transaction. See, generally, Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979).

To extend the Service's statute of limitations for asserting transferee liability against [redacted], the successor to New [redacted], we recommend that you obtain its consent to an extension of the statute of limitations. To do so, you should use Form 977, "Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary." In the space for the transferee, identify as "[redacted] (E.I.N. [redacted]), as successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted], successor-in-interest to [redacted] (E.I.N. [redacted])." Identify the transferor as "the [redacted] consolidated group (E.I.N. [redacted])," and the tax periods as [redacted], [redacted], [redacted], [redacted], and [redacted].

**Other Considerations**

The following language should be inserted into a corporate Form 872:

> With regard to interests held in entities that are subject to the TEFRA unified audit and litigation procedures, and without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including penalties, additions to tax and interest) attributable to any partnership items, affected items, computational adjustments, and partnership items converted to nonpartnership items. This agreement also extends the period for filing a request for administrative adjustment. For partnership items that have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items

not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

If a Form 872-A is used, the following language must be added to the above language:

The issuance of a notice of deficiency will not terminate this agreement under paragraphs (1) and/or (2) for the items described by this paragraph.

We further remind you that you must notify the taxpayer of its right 1) to refuse to extend the period of limitations, or 2) to limit the extension to a particular issue, or 3) to limit the extension to a particular period of time. Further, it is suggested that you secure consents to extend statutes of limitation by sending Letter 907(DO).

2. and 3. 1997 Partnership Statutes: Section 1234(a) of the Taxpayer Relief Act of 1997 ("TRA '97"), Pub. L. No. 105-34, 111 Stat. 788, 1024, amended the definition of a small partnership under section 6231(a)(1)(B)(i). That amendment, effective for partnership tax years ending after August 5, 1997, provides that C corporations can now be partners of partnerships qualifying for the small partnership exception to the TEFRA unified audit and litigation procedures. The tax year to which your advice request concerning the partnership statutes applies was the 1997 partnership taxable year for each of the above-identified partnerships. Thus, this change was in effect for those partnership tax years.

Prior to the 1997 modification, a qualifying "small partnership" could have only individuals and estates of deceased partners as partners. However, TRA '97 did not change the statutory language requiring a partnership qualifying for the small partnership exception under section 6231(a)(1)(B)(i), which nevertheless desires to be covered by the TEFRA unified audit and litigation provisions, affirmatively to "elect in," pursuant to section 6231(a)(1)(B)(ii).

We note that section 6233(a) provides for extension, by regulation, of the TEFRA unified audit and litigation provisions where a partnership return is filed by an entity for a taxable year but it is determined that the entity is not a partnership for such year. Treas. Reg. § 301.6233-1(d)(1) makes clear that any such extension of the TEFRA provisions under that statutory authority does not extend to partnerships excepted under section 6231(a)(1)(B) - the small partnership exception.

From the above it is evident that the partnerships fall within the small partnership exception for their taxable years ending [redacted]. They did not file the election statements effective for the [redacted] taxable year at the time and place prescribed for filing the partnership return as envisioned by the first two sentences of Temp. Treas. Reg. § 301.6231(a)(1)-1T(b)(2) to be treated as TEFRA partnerships.

Inasmuch as the TEFRA audit and litigation provisions do not apply to any adjustments to partnership or affected items, the adjustments are controlled, individually, by the assessment statutes that apply to the partners themselves. See, e.g., McKnight v. Commissioner, 7 F.3d 447 (5th Cir. 1993).

Since the partners with respect to which your request applies are members, other than the common parent, of affiliated groups that elected to file consolidated returns, absent any other complicating circumstances, that common parent alone can extend the statute of limitations for any adjustments arising from its subsidiary's distributive share of partnership items. Treas. Reg. § 1.1502-77(c)(1).

While your request does not seek advice on bringing the partnerships within the TEFRA audit provisions, we note that Temp. Treas. Reg. § 301.6231(a)(1)-1T does permit the "election in" where the date on which the period of limitations under section 6229(a), determined with regard to extensions of that period under section 6229(b), expires not less than one year from the date that the election is filed. If you seek such advice, please advise us that you wish for such information, and we will supplement this advice.

4. and 5. TEFRA Partnership Adjustment Consents: Under section 6224(c), "[a] settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership taxable year." With the exception of partners who are not "notice partners," as defined by section 6231(a)(8), 6224(c) does not provide a method for the tax matters partner to bind other partners to a settlement agreement. Based upon this, we believe that the partner is the proper party to enter into such agreements. Here, the corporate partners still in existence (i.e., [redacted] and [redacted]) should execute these agreements. Additionally, since they were members of the [redacted] consolidated group during the years at issue, the common

parent must sign for them. In this case, since the common parent is no longer in existence, we believe that the alternative agent to the common parent, New [redacted], is the proper party to authorize assessment attributable to partnership items of these partners which were members of the Old [redacted] group for the tax years at issue.

Treas Reg. § 301.6231(a)(7)-1(l)(1) describes the events terminating the designation of a tax matters partner. These include dissolution or liquidation of an entity designated as tax matters partner, among other things. Treas. Reg. § 301.6231(a)(7)-1(l)(1)(iii). Significantly, the regulations do not identify a merger or consolidation of a corporate tax matters partner as an event terminating such a designation.

In the instant case, [redacted] merged with [redacted] which, according to our understanding of the facts, remains a corporation in existence.

For each partner in the [redacted] identified partnerships for which [redacted] ("[redacted]"), was the tax matters partner under section 6231(a)(7), you should identify the taxpayer as the corporate partner. In the case of [redacted], and [redacted], you should identify these corporations as the taxpayers. In the case of [redacted], you should identify the taxpayer as "[redacted], as successor-in-interest to [redacted]" For each, you should identify the tax matters partner as "[redacted], as successor by merger to [redacted]"

For each corporate partner executing a Form 870-P, you must obtain the signatures of both an authorized representative of the corporate partner, and of an authorized representative of the common parent of the affiliated group under which the corporate partner was included for that taxable year. For the corporate partner signature line, identify the partner as follows:

> [redacted], as successor-in-interest to [redacted], partner of <*insert name of partnership to which this consent applies*>, by <*insert name and title of authorized representative/officer signing for* [redacted]>.

Use a similar format for the partner signature line for each of the Forms 870-P to be executed by [redacted] and [redacted].

Inasmuch as each of the corporate partners - [redacted], [redacted], and [redacted] - were members of the consolidated

group of which Old [redacted] was the common parent in the years at issue, you must obtain the signature of an authorized representative of New [redacted] on each Form 870-P. Identify the common parent signature line with the following language:

> [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N. [redacted]), as successor-in-interest to [redacted] (E.I.N. [redacted]), formerly named [redacted] (E.I.N.: [redacted]), by *<insert name and title of authorized representative/officer signing for* [redacted]*>*, as agent for and common parent of *<insert name of corporate partner>*, partner of *<insert name of partnership to which this consent applies>*.

Please do not hesitate to contact Bill Davis if you need further assistance concerning this matter, at (303) 844-2214, ext. 259.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By: S /
DAVID J. MUNGO
Associate Area Counsel (LMSB)